INDEX

Opinions Below 1

Jurisdiction 2

Statement 2

Summary of Argument 2

Argument 4

The Instant Case Cannot Be Distinguished from the Albuquerque Case . . . 4

The Petition Herein Adds Nothing To The Arguments Which This Court Rejected In The Albuquerque Application . . . 5

Conclusion 7

CITATIONS

Cases:

Clearfield Trust Company vs. United States, 318 U. S. 363. 6

Cooke vs. United States, 91 U.S. 389. . . . 6

National Metropolitan Bank vs. United States, 323 U. S. 454. 5

Pierce vs. United States, 7 Wallace 666. . . 6

United States vs. Priscilla Barker, 12 Wheaton 559 6

United States vs. First National Bank, Albuquerque 131 Fed. (2d) 985, Certiorari Denied 318 U. S. 774. . . . . 2, 3, 4, 5, 6

United States vs. Guaranty Trust Company, 293 U. S. 340. 6

United States vs. National Exchange Bank of Baltimore, 270 U. S. 527. 6

United States vs. National Exchange Bank of Providence, 214 U. S. 302. 5

United States vs. The Bank of Metropolis, 15 Peters 377. 6

United States Code:

28 U. S. C., 1254(1) 2

Texts:

7 Am. Juris., 435 6

9 C. J. S. 742 6

No. 333

In the Supreme Court of the United States

OCTOBER TERM, 1949

UNITED STATES OF AMERICA

Petitioner

versus

CONTINENTAL-AMERICAN BANK & TRUST COMPANY and MERCANTILE NATIONAL BANK AT DALLAS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, pursuant to Rule 38, Paragraph 3, file this brief in opposition to the petition for certiorari herein.

OPINIONS BELOW

The opinion of the District Court on the motion for summary judgment (R. 26-36) is reported at *67 F. Supp. 759*, its opinion at the trial on the merits (R. 148-162) at

79 F. Supp. 450. The opinion of the Court of Appeals for the Fifth Circuit on the first appeal is reported at *161 Fed. (2d) 935*, its opinion on the second appeal (R. 182-185) at *175 Fed. (2d) 271.*

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the provisions of *28 U. S. C., 1254(1)*, assigning the following reasons for granting the writ:

"1. The Court below refused to follow the controlling decisions of this Court.

"2. The so-called 'impostor rule' has no application to Government checks.

"3. The question is important."

STATEMENT

Respondents accept petitioner's statement of facts for the purpose of this brief, but respectfully reserve the right to question its accuracy upon plenary argument if such becomes necessary.

SUMMARY OF ARGUMENT

In *United States vs. First National Bank, Albuquerque, 131 Fed. (2d) 985 (C. C. A. 10)*, the "impostor rule" was invoked to defeat the claims of the United States in a suit presenting the identical legal problem posed by the petition in the instant case.

The "impostor rule" applied in the *Albuquerque* case, held by the Court below to correctly state the federal law on the first appeal, *161 Fed. (2d) 935*, and applied to the facts of this case on the second appeal, *175 Fed. (2d) 271*, is stated in the following language:

> "With few exceptions, it is held that the drawer of a check, bill of exchange, or other negotiable instrument, cannot recover from an intermediary bank on its endorsement, or from the payee bank upon its payment, where the check, bill or other instrument is drawn and delivered to an imposter under the mistaken belief on the part of the drawer that he is the person whose name he has assumed and to whose order the check, bill, or other instrument is made payable, and the intermediary bank acquires it from the imposter upon his endorsement thereon of the name of the payee, or the payee bank pays it upon such endorsement, as the case may be. Although not in full accord in respect of the reasons for their conclusion, most courts hold that while the drawer acts in the mistaken belief that the person with whom he deals either in person or *by correspondence* is the person whose name he has assumed and pretends to be, still it is the intent of the drawer to make the check, bill, or other instrument payable to the identical person with whom he deals and therefore to be paid on his endorsement; and that accordingly payment to him or his endorsee merely effectuates the intent of the drawer."/1

On March 15, 1943, this Court denied certiorari in

1/ **United States vs. First National Bank, Albuquerque, 131 Fed. (2d) 985,** emphasis supplied.

the *Albuquerque* Case/[2] and the limited purpose of this brief is to point out that the instant petition adds no valid argument to those rejected in the Albuquerque application.

ARGUMENT

The Instant Case Cannot Be Distinguished From the Albuquerque Case.

Petitioner's attempt to distinguish this case from the *Albuquerque* Case on the ground that the latter involved a physical meeting between the imposter and the disbursing officer/[3] is contradicted by its statement to the effect that the two cases are similar/[4] and by Footnote Three of its petition for certiorari in the *Albuquerque* Case reading:

> "Notwithstanding the assumption of the court below, there is nothing in the record to show that the imposter Ott applied in person to the Veterans Facility at Albuquerque, New Mexico, for the application or loan or, if he did, what dealings he had in respect of the loan with any employee or agent of the United States. In any event it is clear that the check was not delivered to him personally. It was addressed by mail to the veteran named in the certificate at a hotel address which had been given by the imposter. (R. 19). We do not regard these points as at all controlling."/[5]

2/ **318 U. S. 774.**
3/ Petitioner's brief pages 23 to 25.
4/ Petitioner's brief page 20.
5/ See page 7 of petition for certiorari in **United States vs. First National Bank, Albuquerque,** No. 695, October Term, 1942.

The Petition Herein Adds Nothing to the Arguments Which This Court Rejected in the Albuquerque Application.

It is contended that the decision below is in conflict with two decisions of this Court, *United States vs. National Exchange Bank of Providence, 214 U. S. 302*, and *National Metropolitan Bank vs. United States, 323 U. S. 454*. The asserted conflict with the *Exchange Bank of Providence Case* was unsuccessfully urged in the *Albuquerque* application. The statement of the facts of the *Metropolitan Bank Case* appearing in the footnote on Page 13 of the petition shows that the case involved nothing more than a plain forgery and is therefore irrevelant to a consideration of the question presented by the instant petition. The checks were never delivered to the persons for whom they were intended. They obviously were not intended for the clerk who forged the signatures. He did not impersonate the payees. The intent was that they should be delivered to the military personnel named therein but they were intercepted by the clerk when they arrived at the Paymaster's office. The intention of the drawer was never carried out as in the case of an impostor. In any event the "impostor rule" was neither urged nor discussed.

The contention that the "impostor rule" has no application to Government checks is a mere reiteration and amplification of the arguments in support of the same contention which this Court rejected in the *Albuquerque*

application. It ignores the fact that the rule is supported by the weight of authority/6, as well as the numerous decisions of this Court to the effect that the United States as a party to commercial paper is bound by the same principles that govern private persons in their relation to such paper./7

The asserted importance of the question is even less apparent now than six years ago when this Court, in the face of the same contention, denied certiorari in the *Albuquerque* Case. In that application petitioner argued that the question was important "in the light of the fact that owing to the constantly increasing number of checks which the Government issues, an increasing number of these cases involving the imposter question may be expected."/8 The check involved in the *Albuquerque* Case was cashed on April 7, 1931. We knew of no case, and the Solicitor General has cited none, other than the present controversy over $6,035, involving the application of the "impostor rule" to Government checks which has reached an Appellate Court since the *Albuquerque* decision. Under the circumstances the decision of the Court below cannot reasonably be regarded as a threat to the public fisc.

6/ 7 Am. Juris. 435. 9 C. J. S. 742.

7/ United States vs. Priscilla Barker, 12 Wheaton 559; United States vs. The Bank of Metropolis, 15 Peters 377; Pierce s. United States, 7 Wallace 666; Cooke vs. United States, 91 U. S. 389; United States vs. National Exchange Bank of Baltimore, 270 U. S. 527; United States vs. Guaranty Trust Company, 293 U. S. 340; Clearfield Trust Company vs. United States, 318 U. S. 363.

8/ See page 14 of petition for certiorari in United States vs. First National Bank, Albuquerque, No. 695, October Term, 1942.

CONCLUSION

For the reasons stated Respondents respectfully submit that the decision of the Court below is correct, the question presented is of no public importance and the petition for certiorari should be denied.

Respectfully Submitted,

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